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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-462

FORD MOTOR COMPANY,

Petitioner,

—v.—

MAURIZIO D. FORTUNATO,

Respondent.

PETITIONER'S REPLY MEMORANDUM

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Respondent's Brief in Opposition makes no attempt to justify plaintiff's counsel's summation or even to palliate its impact upon the jury. Instead, with the same gross irresponsibility manifested in the summation, it misstates the record, thereby making necessary this reply memorandum.

Respondent's Brief in Opposition asserts that "plaintiff's evidence established that the design of the automobile in question was such as in effect to make it a bomb on wheels" and that "[t]his was undisputed and unchallenged" (p. 2). This is an inconceivably glaring mischaracterization of the record.

The testimony supporting plaintiff's theory of the accident was entirely speculative and hypothetical. It came from professed experts who admittedly had performed no tests to support their *a priori* reasoning. This testimony

was disproved by defendant's tests, which showed that even after a hole had been drilled in the top of the gas tank of a Mustang: (1) it was impossible to reach an explosive limit without a strong odor of gasoline (R. 617a-618a, 622a*) —which plaintiff admitted never existed (R. 157a), and (2) with the car moving as described by plaintiff (R. 110a-112a), it was impossible to reach the minimum explosive limit (R. 615a-617a).** Under these circumstances, to call plaintiff's claims "undisputed and unchallenged" is an abuse of the certiorari process, which, in the absence of a full review of the record, depends on the candor of counsel. At the very least, as Judge Mansfield stated,

> "the tests and expert testimony introduced by Ford in its effort to show that the accident could not have been caused by a defect in the gas tank of plaintiff's Mustang, when considered with all of the other evidence, demonstrates that the issue of liability was an extremely close one." (Petition, p. 17a.)

Respondent's Brief in Opposition's oblique reference to the well-known size of Ford (p. 6) is of course no justification for rubbing in this fact in an emotional summation. The Brief in Opposition makes no claim that the Court of

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* "R." citations, as in the Petition, are to the Appendix in the Court of Appeals.

** Defendant's expert testified that the explosive limit was nearly reached by leaving the test Mustang standing in the sun for ten minutes with its windows completely closed (R. 616a, 621a-622a). Respondent's Brief in Opposition highlights this testimony (pp. 5-6) without even mentioning that this result was obtained with the car stationary in the sun with its windows closed, while plaintiff's car had been moving at night with at least one window open (R. 110a-112a, 115a). Respondent likewise fails to mention that even in this unrepresentative test there was a strong odor of gasoline (R. 622a-623a). Instead of charging Petitioner with "regrettable lack of candor" (Brief in Opposition, p. 5), Respondent might better examine his own restatement of the facts.

Appeals applied the proper legal standard in excusing the District Court's refusal to intervene. Instead, it argues that the questions presented by the Petition are beneath this Court's notice because "[t]his is an ordinary personal injury action" (p. 1).

The questions raised by the Petition—the trial court's duty to respond to deliberate appeals to prejudice, and the equal treatment of individuals and corporations—go directly to the integrity of the federal trial process. As shown by the Petition (pp. 10-14), they are questions upon which the Courts of Appeals differ sharply among themselves and with controlling decisions of this Court. Once before, almost two generations ago, the Court granted certiorari in a personal injury action to provide guidance on the trial court's duty when faced with a prejudicial summation. *New York Central R.R.* v. *Johnson*, 279 U.S. 310 (1929). Such guidance is even more seriously needed today.

CONCLUSION

For the reasons given above and in the Petition for Certiorari, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 10, 1972.

Dated: New York, New York
October 3, 1972

Respectfully submitted,

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